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IN THE

Supreme Court of the United States

STEVEN A. ODOM; MARK GERGEL; HENSLEY E. WEST; MARTIN D. KIDDER; STEPHEN J. CLEARMAN,
Petitioners,

v.

PEDRO YANG; CAROL JACKSON; PETER S. KELSCH, ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED; JAMES BARBERIAN; JOSEPH KINOSIAN; KAREN KINOSIAN; JASON THOMPSON; RAYMOND T. CRUMP,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *American Pipe & Construction Company* v. *Utah*, 414 U.S. 538 (1974), the filing of a class action tolls the statute of limitations on individual class members' claims until the question of class certification is decided.

The question presented is:

Whether, after a motion for class certification is denied on the ground that the class representative is inadequate, another class member can file a second, substantially identical class action, as opposed to an individual action, in a different court and again toll the statute of limitations for all putative class members.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS AND JUDGMENTS BELOW	1
JURISDICTIONAL STATEMENT	1
STATUTE OR RULE INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	10
I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND IS INCONSISTENT WITH DECISIONS OF THIS COURT	10
II. THE ISSUE PRESENTED IS RECURRING AND IMPORTANT TO THE FAIR ADMINISTRATION OF JUSTICE	19
CONCLUSION	25

TABLE OF AUTHORITIES

CASES Page

Adams Pub. Sch. Dist. v. *Asbestos Corp.*, 7 F.3d 717 (8th Cir. 1993) 23
Amchem Prods., Inc. v. *Windsor*, 521 U.S. 591 (1997) 21, 22
American Pipe & Constr. Co. v. *Utah*, 414 U.S. 538 (1974) 2, 3, 16, 18
Andrews v. *Orr*, 851 F.2d 146 (6th Cir. 1988) 12, 17
Baldwin County Welcome Ctr. v. *Brown*, 466 U.S. 147 (1984) 24
Basch v. *Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998) 12, 18
Board of Regents v. *Tomanio*, 446 U.S. 478 (1980) 18, 21
Burns v. *Ersek*, 591 F. Supp. 837 (D. Minn. 1984), *abrogated on other grounds, Agency Holding Corp.* v. *Malley-Duff Assocs.*, 483 U.S. 143 (1987) 14
Carpenter v. *Stephen F. Austin State Univ.*, 706 F.2d 608 (5th Cir. 1983) 15
Catholic Soc. Servs., Inc. v. *INS*, 232 F.3d 1139 (9th Cir. 2000) 12, 15
Chardon v. *Fumero Soto*, 462 U.S. 650 (1983) 17
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) 19
Crown, Cork & Seal Co. v. *Parker*, 462 U.S. 345 (1983) 2, 3, 11, 16, 17
In re Elscint Ltd. Secs. Litig., 674 F. Supp. 374 (D. Mass. 1987) 14
Fleck v. *Cablevision VII, Inc.*, 807 F. Supp. 824 (D.D.C. 1992) 14
Fleming v. *Bank of Boston Corp.*, 127 F.R.D. 30 (D. Mass. 1989), *aff'd*, 922 F.2d 20 (1st Cir. 1990) 14

TABLE OF AUTHORITIES – continued

Page

Griffin v. *Singletary*, 17 F.3d 356 (11th Cir. 1994) 2, 10, 13
Hansberry v. *Lee*, 311 U.S. 32 (1940) 23
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) 23
Klehr v. *A.O. Smith Corp.*, 521 U.S. 179 (1997) 20
Korwek v. *Hunt*, 827 F.2d 874 (2d Cir. 1987). 10, 12, 16
McKowan Lowe & Co. v. *Jasmine, Ltd.*, 295 F.3d 380 (3d Cir. 2002) 9
Robbin v. *Fluor Corp.*, 835 F.2d 213 (9th Cir. 1987) 2, 12, 14
Salazar-Calderon v. *Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985) 2, 11
Tosti v. *City of Los Angeles*, 754 F.2d 1485 (9th Cir. 1985) 23
United Airlines, Inc. v. *McDonald*, 432 U.S. 385 (1977) 17
Young et ux. v. *United States*, 535 U.S. 43 (2002) 23, 24

STATUTES AND REGULATION

15 U.S.C. § 77k 4
§ 77m 6
§ 77*o* 4
§ 78j(b) 4
§ 78t(a) 4
17 C.F.R. § 240.10b-5 4

RULES

Fed. R. Civ. P. 12(b)(6) 1, 6
Advisory Comm. Notes, Fed. R. Civ. P. 23 19
Fed. R. Civ. P. 23 ..... 3, 5
Fed. R. Civ. P. 24 22

TABLE OF AUTHORITIES – continued

SCHOLARLY AUTHORITY — Page

Civil Procedure – Class Actions – Third Circuit Holds That The Filing Of A Class Action Tolls The Statute Of Limitations For A Subsequent Class Action When The Initial Denial Of Class Certification Is Unrelated To The Appropriateness Of The Underlying Claims For Class Treatment, 116 Harv. L. Rev. 2230 (2003) 15

OTHER AUTHORITIES

17 No. 8 Fed. Litigator 189 (2002) 16
18 No. 8 Fed. Litigator 2 (2003) 15
Manual for Complex Litigation (Fourth) (2004) 22
5 James W. Moore, *Moore's Federal Practice* (3d ed. 2004) 15
U.S. Courts, Judicial Business of the United States Courts, *at* http://www.uscourts.gov/judbususc/judbus.html (last viewed Feb. 23, 2005) 19

PETITION FOR A WRIT OF CERTIORARI

Petitioners Steven A. Odom, Mark Gergel, Hensley E. West, Martin D. Kidder, and Stephen J. Clearman (jointly, "petitioners") seek a writ of certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS AND JUDGMENTS BELOW

On December 15, 2004, the court of appeals issued its decision reversing the district court order granting petitioners' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). That decision is reported at 392 F.3d 97 (3d Cir. 2004) (App. 1a-30a). The United States District Court for the District of New Jersey issued an order granting petitioners' motion to dismiss the case on June 2, 2003. That decision is reported at 265 F. Supp. 2d 469 (D.N.J. 2003) (App. 31a-42a). The district court granted the motion to dismiss on the ground that a prior class action in the United States District Court for the Northern District of Georgia did not toll the statute of limitations for future class actions; the prior class action is *In re World Access, Inc. Securities Litigation*, 1:99-cv-43-ODE (N.D. Ga.). The July 26, 2001 order of the Georgia district court rejecting the parties' stipulation of class certification (App. 81a-82a), the July 1, 2002 decision denying the motion for class certification (App. 47a-80a), and the August 9, 2002 order denying the plaintiffs' motion for reconsideration of the order denying certification (App. 43a-46a), are not reported.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. The court of appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE OR RULE INVOLVED

Federal Rule of Civil Procedure 23 is set forth at App. 83a-89a.

INTRODUCTION

The filing of a class action tolls the statute of limitations on individual class members' claims until the question of class certification is decided. *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538 (1974); *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345 (1983). In the decision below, the Third Circuit held that if a class-certification motion is denied on the ground that the class representative is inadequate, a putative class member can file a second, substantially identical class action in a different court and thereby relitigate the propriety of class certification and again toll the statute of limitations for putative class members.

The Third Circuit recognized that its decision directly conflicts with the rule adopted by the Eleventh Circuit in *Griffin* v. *Singletary*, 17 F.3d 356 (11th Cir. 1994). See App. 14a-15a. There, the Eleventh Circuit refused to "'piggyback one class action onto another,' and thereby engage in endless rounds of litigation . . . *over the adequacy of the successive named plaintiffs to serve as class representatives*." 17 F.3d at 359 (citation omitted) (emphasis supplied). In addition, the Third Circuit's holding is contrary to decisions of numerous courts of appeals which have rejected in unequivocal terms any argument that "putative class members [can] piggyback one class action onto another and thus toll the statute of limitations indefinitely," *Salazar-Calderon* v. *Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985), on the ground that "extend[ing] tolling to class actions 'tests the outer limits of the *American Pipe* doctrine and . . . falls beyond its carefully crafted parameters into the range of abusive options," *Robbin* v. *Fluor Corp.*, 835 F.2d 213, 214

(9th Cir. 1987) (omission in original) (quoting *Korwek* v. *Hunt*, 827 F.2d 874, 879 (2d Cir. 1987)).

Equally to the point, the Third Circuit rule is in substantial tension with this Court's opinions in *American Pipe* and *Crown, Cork & Seal*, both of which expressly state that *individual claims* are tolled, see, *e.g.*, 414 U.S. at 552, 462 U.S. at 346-47; and neither of which gives any indication that class actions can be stacked one atop the other to permit stop-and-start tolling and render the relevant statute of limitations wholly indeterminate. *American Pipe* and *Crown, Cork & Seal* crafted a tolling rule by striking a specific balance between the efficiency concerns undergirding Fed. R. Civ. P. 23 and the repose and stability interests embodied in limitations periods. The Third Circuit rule upsets the balance struck by this Court by entirely ignoring the interests supporting statutes of limitation.

There can be no doubt that the question presented is both recurring and important. As this petition reflects, numerous courts of appeals and district courts have grappled with the issue. The growth in class-action litigation and the virtually dispositive importance of the class-certification decision ensure that plaintiffs and class counsel will regularly seek a second or third bite at the apple of class certification in a different forum if an initial motion for class certification is denied. Moreover, the continuing conflict on this question contravenes the central purpose of the Federal Rules of Civil Procedure to establish uniform treatment of procedural questions in federal cases and thus prevent forum shopping. In addition, the conflict gives rise to fundamental unfairness because litigants face different limitations rules depending upon whether their case is filed in Georgia or New Jersey. This Court should grant the petition and resolve the conflict on this critically important question that may affect all limitations rules in class-action litigation.

STATEMENT OF THE CASE

1. On January 7, 1999, the first of what would be 22 class action complaints against World Access, Inc. ("WAXS") and former officers and directors of WAXS was filed in federal district court in the Northern District of Georgia. App. 3a. Ultimately, these actions were consolidated as *In re World Access, Inc. Securities Litigation*, 1:99-cv-43-ODE (N.D. Ga.).

The consolidated amended complaint made claims under sections 11 and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k & 77*o* ("Securities Act"); sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) & 78t(a) ("Exchange Act"); and the regulations that the Securities and Exchange Commission prescribed thereunder. See Rule 10b-5, 17 CFR § 240.10b-5. Specifically, the complaint alleged that WAXS and its former officers and directors made materially false and misleading statements and failed to disclose material information concerning WAXS' products, revenues, earnings, inventory and sales practices, and that the plaintiffs had relied on those misstatements and omissions to their detriment. App. 3a. The complaint set forth three subclasses based on how members of each subclass came into possession of WAXS stock during the class period: (1) the NACT merger class, (2) the Telco merger class, and (3) the Open Market class. *Id.*

Plaintiffs filed a motion seeking class certification and the approval of "lead" plaintiffs on July 21, 2000. In March 2001, the Northern District of Georgia appointed three lead plaintiffs – Cari Thompson for the NACT class, John Brothers for the Telco class, and William Tanner for the Open Market class – and directed those plaintiffs to file a joint motion for class certification. App. 4a. On April 18, 2002, plaintiffs filed their motion, and WAXS and its former officers and directors stipulated to class certification. *Id.*

On July 26, 2001, however, the Northern District of Georgia rejected the stipulation, holding that the parties had not demonstrated that Fed. R. Civ. P. 23 had been satisfied. App. 4a; *id.* at 81a-82a. The order stated simply that "the parties have failed to make an appropriate showing that the requirements of Rule 23 have been satisfied as required by the United States Supreme Court." *Id.* at 81a-82a.

The lead plaintiffs renewed their motion for class certification on January 9, 2002, a motion that the defendants did not oppose. On July 1, 2002, the district court issued an order and addressed the propriety of certification of each subclass, finding "deficiencies in each," App. 4a. Specifically, the court expressed "numerous . . . concerns regarding Tanner's representation" of the Open Market class, *id.* at 73a; and the court found that "Thompson has failed to meet her burden regarding numerosity" in connection with the NACT merger class, *id.* at 76a-77a. The court also concluded that Brothers might not be able to prove that he suffered harm as a result of the Telco merger and therefore that he could not "properly represent those members of the Telco class who were harmed by the merger." *Id.* at 78a. The court thus denied the motion for class certification with prejudice. *Id.* at 80a.

The plaintiffs' motions for reconsideration and for interlocutory Eleventh Circuit review pursuant to Fed. R. Civ. P. 23(f) were denied. See App. 43a-46a. The action continued in the Northern District of Georgia on behalf of five individual plaintiffs.[1]

2. On December 17, 2002, Yang, Jackson and Kelsch – one member from each of the three subclasses of the class

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[1] At the oral argument in the Third Circuit, "defendants' counsel reported that the Northern District of Georgia had granted summary judgment in the defendants' favor on the individual plaintiffs' claims." App. 4a n.3 (citing *In re World Access, Inc. Sec. Litig.*, 310 F. Supp. 2d 1281 (N.D. Ga. 2004)). This judgment is now final.

that sought and was denied certification by the Northern District of Georgia – filed this "substantively identical class action in the District of New Jersey . . . against the same defendants." App. 4a. The district court consolidated their action with another brought by James Barberian and Karen Kinosian, and then appointed Jason Thompson and Raymond Crump as lead plaintiffs for the consolidated action. *Id.* at 4a n.4.

Neither the subclass representatives nor the lead plaintiffs had intervened in the earlier suit in the Northern District of Georgia. App 5a. They acknowledged that they chose not to file a separate suit as class representatives in Georgia because under the law of the Eleventh Circuit, the filing of a second class action would be time barred. *Id.*

On March 13, 2003, WAXS and its former officers and directors moved to dismiss the consolidated complaint pursuant to Fed. R. Civ. P. 12(b)(6), on the ground, *inter alia*, that the new class action is barred by the one-year statute of limitations for federal securities fraud claims. See 15 U.S.C. § 77m. On June 2, 2003, the district court granted the motion.

The court first explained that the statute of limitations began to run on January 5, 1999, and that the action was not filed until December 17, 2002; thus, absent tolling, the action was almost three years out of time. App. 37a. The court also observed that under the rule established by *American Pipe*, the prior class action in the Northern District of Georgia tolled the statute of limitations for subsequent individual claims by members of the putative class from the date the suit was filed (January 7, 1999) until the motion for class certification was denied. See *id.* at 38a. But, the court stated, "*American Pipe* has been interpreted in most courts considering the issue as holding that 'stacking' one class action atop another following class certification is prohibited." *Id.* (citing cases). This anti-stacking rule forbids the "filing of a new class action in a different district court after the statutory period has expired"; and for that reason, the

new class action was dismissed. *Id.* at 40a. Finally, the court noted that individual plaintiffs whose claims had not expired lawfully could have chosen to intervene in the ongoing action in the Northern District of Georgia. *Id.* at 41a.

3. A divided panel of the Third Circuit reversed. It agreed with the district court that the statute of limitations began to run on January 5, 1999, and that absent tolling, the one-year limitations period applicable to the action had expired. App. 6a. The court of appeals further agreed with the district court that tolling began "on January 7, 1999, the date that the first of the *In re World Access* suits was filed in the Northern District of Georgia." *Id.* And, the court held that tolling ceased on July 1, 2002, the day that the Northern District of Georgia denied the motion for class certification with prejudice. *Id.* at 8a. Because "[o]nly two days had elapsed between the start of the limitations period and the filing of the first *In re World Access* suit," and because less than six months passed between the denial of class certification and the December 17, 2002 filing of the complaint in the District of New Jersey, the second class action complaint was timely "to the extent tolling applies." *Id.*

While recognizing that its decision placed it in direct conflict with the decisions of other circuits (App. 13a-16a), the Third Circuit decided that with respect to the Open Market and Telco subclasses, the statute of limitations for the new class action in New Jersey *was* tolled by the earlier class action in Georgia. But, the statute of limitations was *not* tolled for the NACT subclass. The court explained that:

> *American Pipe* tolling applies to would-be class members who file a class action following the denial of class certification due to Rule 23 deficiencies of the class representative. *American Pipe* tolling will not apply to sequential class actions where the earlier denial of certification was based on a Rule 23 defect in the class itself. [*Id.* at 11a-12a.]

Thus, the court concluded the claims of the Open Market and Telco subclasses were tolled by action in the Northern District of Georgia because certification was denied to those subclasses on the ground that the class representatives were inadequate. But, the claims of the NACT subclass were not tolled because certification was denied due to the class representative's failure to make the required showing of numerosity. *Id.* at 23a. In so holding, the Third Circuit acknowledged that "[i]n tolling limitations periods for subsequently filed class actions where the sole basis for the earlier denial of certification was the deficiency of the lead plaintiff as class representative, *we inevitably break from some Circuits' treatment of the issue, for the decisions are mixed.*" *Id.* at 12a (emphasis supplied).

As the court detailed, the circuits follow "three approaches" in addressing tolling and sequential class actions: Most courts of appeals refuse to toll limitations for a subsequent class action when a prior class certification was denied without distinguishing among the various grounds for denial of class certification under Federal Rule of Civil Procedure 23. The Eleventh Circuit bars tolling for all sequential class actions, but has made explicit that its bar includes class actions in which the prior class certification was denied because the class representative was inadequate. Indeed, the Third Circuit noted that the Eleventh Circuit's position "has special significance here because its precedential force . . . is precisely what [the plaintiffs] sought to avoid by not filing this action in the Northern District of Georgia." App. 14a n.6. And, finally, the Third Circuit here adopted the position that a prior class action tolls the statute of limitations for a subsequent class action when the certification was denied because the class representative was inadequate. *Id.* at 12a. In so doing, the Third Circuit expressed the view that the Ninth Circuit's position is "supportive of [its] approach." *Id.* See also *id.* at 16a (explaining that the Ninth Circuit first adopted the Eleventh Circuit's approach, but opining that the

Ninth Circuit's most recent opinion adopts the Third Circuit's approach).

Judge Alito concurred in part and dissented in part. He concurred in the holding that "a prior action in which class certification is denied based solely on deficiencies of the class representative tolls the statute of limitations for filing a later, substantively identical action with a new representative," in light of the Third Circuit's prior decision in *McKowan Lowe & Co.* v. *Jasmine, Ltd.*, 295 F.3d 380 (3d Cir. 2002). See App. 28a. Based on that rule, he concurred in the majority's decision that the claims of the Telco subclass were tolled and that the claims of the NACT subclass were not.

Judge Alito dissented from the majority's conclusion that the claims of the Open Market class were tolled, however, on the ground that the District Court Judge had "stated that certification . . . was denied for failure to meet 'the typicality, commonality, adequacy, and superiority requirements." App. 28a-29a (emphasis omitted) (quoting *id.* at 71a). Because the district judge "found two fatal defects – lack of 'commonality' and 'superiority' – that, as the majority acknowledges, are generally 'used to describe class-based characteristics,'" Judge Alito concluded that the court should have held that the prior action did not toll the statute of limitations for the Open Market subclass. *Id.* at 29a.

Judge Alito also pointed out the practical flaw in the majority's approach:

> Our circuit will attract actions in which courts in other circuits have denied class certification. . . . [T]he courts of our circuit will be asked to look behind the text of the opinions denying certification and to determine whether the authors of those opinions really meant to say or should have said what they did. . . . *[I]n most circuits, the distinction . . . between deficiencies in the representative and defects in the class has no bearing on the tolling of the statute of limitations, and therefore district*

courts in those circuits may not always make it clear whether their rulings rest on representative – or class-based defects. [App. 30a (emphasis supplied).]

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND IS INCONSISTENT WITH DECISIONS OF THIS COURT.

This case involves a direct conflict among the courts of appeals over whether and the extent to which *American Pipe* tolling applies to subsequent class actions. The decision below held that the statute of limitations should be tolled for "would-be class members who file a class action following the denial of class certification due to Rule 23 deficiencies of the class representative." App. 12a. As the Third Circuit acknowledged, its decision "inevitably break[s] from some Circuits' treatment of the issue." *Id.* Most notably, the Eleventh Circuit has expressly refused to toll the statute of limitations in a second class action despite the fact that the first class action was denied due to deficiencies in the class representative. *Griffin*, 17 F.3d at 359. All other circuits have unanimously concluded that *American Pipe* "does not apply to permit a plaintiff to file a subsequent class action following a definitive determination of the inappropriateness of class certification," *Korwek* v. *Hunt*, 827 F.2d 874, 879 (2d Cir. 1987), with no indication that they would create an exception to this blanket rule if the earlier certification were denied due to the inadequacy of the class representative. By carving out an exception for cases in which class certification was denied based on the adequacy of putative class representatives, the Third Circuit's rule conflicts with the rules of six other courts of appeals.

1. In a class action that was substantially identical to this case, the Northern District of Georgia denied a motion for

class certification for three subclasses on the ground that the plaintiff class had failed to meet the requirements of Fed. R. Civ. P. 23(a)(3) and 23(a)(4). App. 71a, 78a. Respondents, who were members of these putative subclasses, did not seek to intervene in the case in the Northern District of Georgia to raise their own claims, as they were entitled to do under *American Pipe*. Nor did Respondents file individual actions in some other jurisdiction, as they were entitled to do under *Crown, Cork & Seal*, 462 U.S. at 353. Instead, class members filed a second, substantially identical class action in the District of New Jersey, attempting to avoid the running of the statute of limitations applicable to class members by "piggyback[ing] one class action onto another" for tolling purposes. *Salazar-Calderon*, 765 F.2d at 1351.

The Third Circuit held that the statute of limitations had been tolled until the class-certification motion was finally denied in the first class action, and that the tolling protected not only putative class members' claims, but also the class members' right to file a second class action, further tolling the limitations period for class members. In so doing, the Third Circuit brought itself into conflict with every other circuit that has faced the question whether class actions can be "stacked" or "piggy-backed" one on top of the other for purposes of tolling the applicable statutes of limitations.

In *Salazar-Calderon*, the earliest court of appeals' decision on point, the Fifth Circuit refused to permit "putative class members [to] piggyback one class action onto another and thus toll the statute of limitations indefinitely." 765 F.2d at 1351. Citing Justice Powell's concern that the tolling rule "is a generous one, inviting abuse," *Crown, Cork & Seal Co.*, 462 U.S. at 354 (Powell, J., concurring), the Fifth Circuit recognized that "to construe the rule as plaintiffs would have us presents just such dangers." 765 F.2d at 1351. The court thus rejected the plaintiffs' position that tolling applies "not only for the first class certification petition filed but also for any subsequent petitions involving the same class." *Id.*

The Second Circuit also declined to toll the statute of limitations for a new class action brought after class certification had been denied. *Korwek*, 827 F.2d at 879. Like the Fifth Circuit, the *Korwek* court recognized that this proposed extension of *American Pipe* "would be inimical to the purposes behind statutes of limitations and the class action procedure." *Id.* The Ninth Circuit echoed these concerns in *Robbin*, where it reasoned "that to extend tolling to class actions 'tests the outer limits of the *American Pipe* doctrine and . . . falls beyond its carefully crafted parameters into the range of abusive options.'" 835 F.2d at 214 (omission in original) (quoting *Korwek*, 827 F.2d at 879); see also *Catholic Soc. Servs., Inc.* v. *INS*, 232 F.3d 1139, 1147 (9th Cir. 2000) (en banc) (reaffirming the Ninth Circuit's refusal to permit a subsequent class action that "is no more than an attempt to relitigate the correctness of the earlier class certification decision").

The Sixth Circuit cited the circuits' then "unanimous agreement" when it held that the "pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class." *Andrews* v. *Orr*, 851 F.2d 146, 149 (6th Cir. 1988). The *Andrews* court found no support for the plaintiffs' theory that "the *American Pipe* tolling rule applies to class members who do not intervene to appeal, but seek to initiate a new class action." *Id.*

More recently, the First Circuit reaffirmed the circuit courts' limitation on *American Pipe* by barring a class action whose "claims depend[ed] on the 'stacking' of two sequential class actions to keep their claims from being untimely." *Basch* v. *Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998). The First Circuit recognized the dangers of an approach that would allow plaintiffs to "stack one class action on top of another and continue to toll the statute of limitations indefinitely." *Id.* Moreover, the court saw the potential for abuse, because "[p]ermitting such tactics would allow lawyers

to file successive putative class actions with the hope of attracting more potential plaintiffs and perpetually tolling the statute of limitations as to all such potential litigants, regardless of how many times a court declines to certify the class." *Id.*

In defending its rule, the Third Circuit explained that none of the cases discussed above involved denial of the initial class certification on the ground that the class representative was inadequate. App. 12a. In that circumstance, the Third Circuit opined, a second litigation of the propriety of class certification under Rule 23 is permitted *and* a second round of tolling is authorized. There are two problems with this attempted distinction: The Eleventh Circuit has expressly rejected it, and nothing in the other circuits' decisions supports it.

Most notably, in precisely the context addressed here – *viz.*, where the initial class-certification was denied based on the inadequacy of the class representative – the Eleventh Circuit followed *Salazar-Calderon* and its progeny and refused to "'piggyback one class action onto another,' and thereby engage in endless rounds of litigation . . . *over the adequacy of successive named plaintiffs to serve as class representatives.*" *Griffin*, 17 F.3d at 359 (citation omitted) (emphasis supplied). Though the Eleventh Circuit applied this Court's rule of tolling the statute of limitations for subsequent *individual* claims, it feared that extending that rule to class claims would allow plaintiffs to "'toll the statute of limitations indefinitely.'" *Id.* at 359-60. Observing that the original lawsuit had been filed 15 years before, the court "decline[d] to adopt any rule that has the potential for prolonging litigation about class representation even further." *Id.* at 359. *Griffin* expressly cited the above-described precedent from other courts of appeals. Numerous district courts have similarly followed the *Griffin* rule in situations

where class certification was denied because of problems with the class representative.[2]

The second problem with the Third Circuit's attempted defense of its rule is that none of the court of appeals decisions holding that *American Pipe* does not permit plaintiffs "to sequentially relitigate a denial of class certification," App. 12a, suggests that a different rule applies if class-certification is denied based on the class representative's inadequacy. Indeed, in *Robbin*, class certification had been denied in the first case because of both the inadequacy of the representative and problems with other Rule 23 elements, but the court made no distinction between the grounds for denial. See 835 F.2d at 214.

The Third Circuit also claimed support from the Ninth Circuit's decision in *Catholic Social Services*. When "read . . . broadly," the panel concluded, *Catholic Social Services* bolsters its "holding that class claims should be tolled where the district court denies class certification based on deficiencies of a class representative, and not on the validity of the class itself." App. 17a. The panel's reliance is

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[2] *See, e.g., Fleck* v. *Cablevision VII, Inc.*, 807 F. Supp. 824, 826 (D.D.C. 1992) (refusing to "extend[] equitable tolling to this situation where, after a first denial of class certification, a new class representative attempts to bring a subsequent class action"); *Fleming* v. *Bank of Boston Corp.*, 127 F.R.D. 30, 37 (D. Mass. 1989) (the reassertion of class claims after certification was denied for lack of standing "would be to sanction and encourage abuse of the class action provisions of federal law"), *aff'd*, 922 F.2d 20 (1st Cir. 1990); *In re Elscint Ltd. Secs. Litig.*, 674 F. Supp. 374, 378 (D. Mass. 1987) (refusing to apply *American Pipe* because it "may condone or encourage attempts to circumvent the statute of limitation by filing a lawsuit without an appropriate plaintiff and then searching for one who can later intervene with the benefit of the tolling rule"); *Burns* v. *Ersek*, 591 F. Supp. 837, 839, 842 (D. Minn. 1984) (refusing to toll the statute of limitations where the original class certification had been denied "on the grounds that plaintiffs were not proper class representatives"), *abrogated on other grounds, Agency Holding Corp.* v. *Malloy-Duff & Assocs.*, 483 U.S. 143 (1987).

misplaced: *Catholic Social Services* took pains to distinguish the unique situation presented from cases in which "the would-be classes in the first actions failed to satisfy criteria of Rule 23" and the plaintiffs in the second action "sought to cure the procedural deficiencies of the first." 232 F.3d at 1148. The Ninth Circuit's holding only applies to situations where the earlier class was properly certified, but the class was subsequently narrowed "for reasons unrelated to Rule 23 certification." *Id.* at 1149. Indeed, because a class had already been certified, most courts would agree that the appropriate remedy was the "appointment of new representatives from the existing class, not decertification." *Carpenter* v. *Stephen F. Austin State Univ.*, 706 F.2d 608, 618 (5th Cir. 1983).

Because every other circuit has categorically refused to extend *American Pipe* to subsequent class claims, the Third Circuit's decision stands in direct conflict with the Eleventh Circuit and with the consensus of six other courts of appeals.

2. This split of authority has been recognized by commentators and the Third Circuit itself. As noted, the decision below conceded that its extension of *American Pipe* "inevitably break[s] from some Circuits' treatment of the issue." App. 12a. In particular, the Third Circuit characterized the Eleventh Circuit's decision in *Griffin* as contrary to its rule. See *id.* at 15a (expressly "reject[ing]" the holding in *Griffin*).

The conflict between the Third and Eleventh Circuits has also been described by treatises and other commentators. See, *e.g.*, 5 James W. Moore, *Moore's Federal Practice* § 23.65[1][b] (3d ed. 2004) (contrasting the Third and Eleventh Circuit's decisions); 18 No. 8 Fed. Litigator 2, 2 (2003) (noting that *Griffin* "does not recognize an exception to the tolling rule" for class representatives, while *McKowan Lowe* does); *Civil Procedure – Class Actions – Third Circuit Holds That The Filing Of A Class Action Tolls The Statute Of Limitations For A Subsequent Class Action When The Initial*

Denial Of Class Certification Is Unrelated To The Appropriateness Of The Underlying Claims For Class Treatment, 116 Harv. L. Rev. 2230, 2233 (2003) (discussing the Third Circuit's "clear split from the Eleventh Circuit's opinion in *Griffin v. Singletary*"); 17 No. 8 Fed. Litigator 189, 190 (2002) (observing the distinction between *Griffin* and cases that tolled the statute of limitations "when a named plaintiff is found to be an inadequate representative of the class").

This acknowledged conflict among the courts of appeals warrants this Court's review.

3. The opinion below is also in substantial tension with the analysis of this Court. *American Pipe* and *Crown, Cork & Seal* established the rule that statutes of limitations for individual claims are tolled until the denial of class certification. Neither the language nor the purposes of those decisions supports tolling for subsequent class claims.

By their terms, both cases authorized tolling statutes of limitations so that "members of the putative class [could] file *individual* actions in the event that class certification is denied." *Crown, Cork & Seal*, 462 U.S. at 346-47 (emphasis supplied); see also *American Pipe*, 414 U.S. at 552 (protecting the "privilege of intervening in an *individual* suit") (emphasis added). Neither case suggests that the statute of limitations should be tolled for subsequent class claims, resulting in a second round of tolling for putative class members. Indeed, the tolling rule is not even triggered until a lawsuit is no longer "permitted to continue as a class action." 414 U.S. at 554.

For this reason, other circuits addressing this issue have focused on the language of this Court's precedents in refusing to toll class claims. See *Korwek*, 827 F.2d at 877 (noting that *Crown, Cork & Seal* tolled the statute of limitations for "all asserted members of a class whether they choose to *intervene* or file '*individual actions*' following the denial of class

certification"); *Andrews*, 851 F.2d at 149 (once class certification is denied, "'class members may choose to file *their own suits* or to intervene as plaintiffs in the pending action'") (quoting *Crown, Cork & Seal*, 462 U.S. at 354). The opinion below, in contrast, discards the plain implication of the Court's words and analysis, asserting that "*Crown, Cork & Seal* goes no further than to state that tolling continues 'until class certification is denied.'" App. 7a (quoting *Crown, Cork & Seal*, 462 U.S. at 354). But, this Court *did* go further in *Crown, Cork & Seal*; the very next sentence stated that class members had a right "to file their *own* suits or to intervene as plaintiffs in the pending action." *Crown, Cork & Seal*, 462 U.S. at 354 (emphasis supplied). This language unmistakably limits the *American Pipe* rule to individual claims, an understanding reflected in other decisions of this Court. See, *e.g.*, *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 392 (1977) (distinguishing the *American Pipe* scenario in which a plaintiff "intervene[s] in order to join the named plaintiffs in litigating her *individual* claim") (emphasis supplied); *Chardon* v. *Fumero Soto*, 462 U.S. 650, 661 n.14 (1983) (tolling "applies whether an unnamed plaintiff intervenes in the named plaintiff's suit after denial of class certification or files his or her *own separate action*") (emphasis supplied).

A rule authorizing a second (and potentially a third and fourth) round of tolling of the statute of limitations for class claims also fails to acknowledge the multiple purposes behind *American Pipe* and *Crown, Cork & Seal* and the balancing of interests that took place. Specifically, this Court's tolling rule strikes a balance between the purposes of Rule 23 and the "interest[s] that statutes of limitations are designed to protect." *Crown, Cork & Seal*, 462 U.S. at 353. The latter interests, which are "fundamental to a well-ordered judicial system," preclude the assertion of new claims when it is "sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a

substantive claim will be barred without respect to whether it is meritorious." *Board of Regents* v. *Tomanio*, 446 U.S. 478, 487 (1980); see also *American Pipe*, 414 U.S. at 554 (statutes of limitations "prevent[] surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared") (quoting *Order of R.R. Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 348-49 (1944)).

The Third Circuit's rule destroys the careful balance this Court struck between Rule 23's effort to promote efficiency and the goal of repose embodied in a statute of limitations. By allowing plaintiffs to "stack one class action on top of another and continue to toll the statute of limitations indefinitely," *Basch*, 139 F.3d at 11, the court below discarded the valid policy of repose. This kind of stop-and-start tolling creates a limitations period that bears no relation to the period specified by Congress. Instead, the limitations period would be the period necessary to resolve whether it is appropriate to proceed with a claim as a class action, however long that takes in as many district courts as are necessary for an adequate plaintiff to emerge or be ruled out.

Nor would the Third Circuit rule encourage the efficiency sought by *American Pipe* and *Crown Cork & Seal*. See, *e.g.*, *American Pipe*, 414 U.S. at 553 (tolling is necessary to avoid "depriv[ing] Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure"). The Third Circuit's rule would authorize litigation of Rule 23 certification in multiple courtrooms on multiple occasions. It would not encourage the naming of noncontroversial or multiple class members as class representatives in order to ensure efficient adjudication of the propriety of class certification. Instead, it would result in piecemeal litigation of class certification questions across numerous courtrooms and jurisdictions, as occurred here.

The Third Circuit rule is, accordingly, in substantial tension with the balance struck in *American Pipe* and *Crown, Cork & Seal*. For this reason, too, review is warranted.

II. THE ISSUE PRESENTED IS RECURRING AND IMPORTANT TO THE FAIR ADMINISTRATION OF JUSTICE.

The recurring nature of the question presented is vividly illustrated by the numerous opinions of courts of appeals and district courts that have grappled with the issue. The objective conditions leading to the issue's recurrence are easily discerned: There are thousands of class actions pending, and more than 3000 additional class actions are filed in federal district courts every year.[3] Class certification raises the stakes of litigation exponentially, often determining whether a case will settle or be tried. As this Court has recognized, the certification of a large class "may so increase the defendant's potential damages liability and litigation costs" that the defendant will be coerced to settle a case without regard to the merits of any defense. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978); Advisory Comm. Notes, Fed. R. Civ. P. 23 ("[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"). Thus, if one court denies class certification, it is eminently worthwhile for the class and class counsel to seek a second chance to be certified in another, perhaps friendlier forum. As long as there is uncertainty about whether such actions can be filed and certified, the issue will recur and consume scarce judicial resources.

The need for this Court's resolution of the issue is equally clear. The issue presented is of utmost importance to the litigation process and the administration of civil justice; it

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[3] The annual reports on the Judicial Business of the United States Courts produced by the Judicial Conference contain statistics on class actions. *See* http://www.uscourts.gov/judbususc/judbus.html.

affects the administration of Rule 23 *and* of all statutes of limitations in federal cases and the policy and purposes of such statutes. The Third Circuit's rule is that the filing of a class action not only tolls the claims of putative class members until the class-certification issue is resolved, but also tolls all class members' rights to seek class certification under Fed. R. Civ. P. 23 if class certification in the first action is denied because the named plaintiff is inadequate. For numerous reasons, this rule will work serious harm to both substantive limitations law and the process of administering Rule 23.

First, the consequence of the Third Circuit's rule is not simply the preservation of a putative class member's claim during the pendency of the class-certification decision. It also means that for a second (and potentially a third or fourth) time the statute of limitations for putative class members is tolled so that class members could still file individual lawsuits or yet another class action. This would extend applicable statutes of limitations many years past their original expiration dates in unpredictable fits and starts.

This kind of successive, replicative, "stacking" application of the rationale of *American Pipe* and *Crown, Cork & Seal* is unlike any other kind of tolling and severely undermines statutes of limitations. In rejecting an argument that the statute of limitations begins to run anew each time a predicate act that is part of a RICO violation occurs, this Court spoke in terms that are fully applicable here:

> [This] rule creates a limitations period that is longer than Congress could have contemplated. Because a series of predicate acts . . . can continue indefinitely, such an interpretation, in principle, lengthens the limitations period dramatically. It thereby conflicts with a basic objective – repose – that underlies limitations periods. [*Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 187 (1997).]

"Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *Tomanio*, 446 U.S. at 487. The Third Circuit's rule treats statutes of limitations as if they were infinitely malleable.

Second, for several reasons, the rule is administratively unworkable. As the initial denial of class certification in the Northern District of Georgia reveals (App. 81a-82a), district courts often deny class certification without stating a reason, and thus without indicating in plain terms whether the denial is directed at the adequacy of the class representative or at the failure to satisfy Rule 23's other requirements.

Moreover, as the second denial of class certification in the Northern District of Georgia illustrates (App. 47a-80a), district judges will often deny class certification in terms that leave it unclear whether the denial is directed at the adequacy of the representative or at the other Rule 23 requirements or both. See *id.* at 71a (denying certification for failure to meet "the typicality, commonality, adequacy, and superiority requirements"). As Judge Alito observed, the district judge "found two fatal defects – lack of 'commonality' and 'superiority' – that, as the majority acknowledges, are generally 'used to describe class-based characteristics.'" *Id.* at 29a.

Further, and absolutely critically, a proposed class representative may be inadequate because his or her own claim is weak, but it is often the case that a class representative is inadequate because his or her interests conflict with those of other class members. In the latter circumstance, it is impossible to separate the inadequacy determination from the other elements of class certification. For example, in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 625-28 (1997), this Court found that intra-class conflicts rendered the named plaintiffs incapable of meeting Federal Rule of Civil Procedure 23(a)(4)'s adequacy-of-representation requirement and thus defeated class certification. But, it was these same

conflicts that also made clear that common issues did not predominate and that the plaintiffs' claims were not typical. *Id.* at 624-25. The Third Circuit's rule – that a denial of certification bars future class actions unless the denial is based on the inadequacy of the class representative – is premised on the wholly false assumption that there is a bright line between the test for an adequate representative and the test for the propriety of class certification.

In sum, as Judge Alito pointed out in dissent, the Third Circuit's rule will require appellate courts to parse and look behind the decisions of district judges in other circuits, a difficult and convoluted prospect at best.

Third, there is an obvious, efficient mechanism to cure the inadequacy of a class representative in those cases where the inadequacy is based on the individual representative's deficiencies rather than deficiencies in the class as a whole. Another class member can intervene in the class action and take the place of the inadequate class representative. See Fed. R. Civ. P. 24; *Manual for Complex Litigation (Fourth)* § 21.26, at 277 (2004) (where a class representative is inadequate, "courts generally allow class counsel time to make reasonable efforts to recruit and identify a new representative who meets the Rule 23(a) requirements. The court may permit intervention by a new representative or may simply designate that person as a representative in the order granting class certification."). This allows a single court to make the Rule 23 inquiry, serving the interests of efficiency that *American Pipe* and *Crown Cork & Seal* embody in their interpretation of Rule 23. It also appropriately balances the interests of repose served by federal statutes of limitations, by preventing stop-and-start tolling. And, it prevents judge and forum shopping by plaintiffs who are not satisfied by the first forum's treatment of the class-certification question.

The tolling rule of *American Pipe* and *Cork Cork & Seal* provides a substantial benefit to plaintiffs. As noted above, it is based on a balancing of the policy considerations

supporting Rule 23 and those supporting statutes of limitation. It is entirely reasonable to limit the tolling rule to the initial class action and to require those accepting the benefit of tolling to take all procedurally viable steps to litigate the propriety of the certification decision in that initial case. Put differently, to obtain the tolling benefit, a class member shoulders the burden of raising and litigating the propriety of class certification, including the burden of demonstrating that there is an appropriate class representative. Cf. *Adams Pub. Sch. Dist.* v. *Asbestos Corp.*, 7 F.3d 717, 718 n.1 (8th Cir. 1993); *Tosti* v. *City of Los Angeles*, 754 F.2d 1485, 1488 (9th Cir. 1985) (tolling ceases for class members who file separate claims and thus opt out of the class action; to retain the benefit of tolling, one must remain bound to the fate of the class action).[4]

This approach is also consistent with the foundational principles of tolling. Where, as here, a statutory limitations period is silent on the question of tolling, that period is "customarily subject to 'equitable tolling.'" *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95 (1990). This Court has "permitted equitable tolling in situations 'where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.'" *Young*

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[4] In addition, the Third Circuit's rule badly distorts litigants' incentives under Rule 23. Defendants will have a strong incentive not to challenge the adequacy of the named representatives, but to seek denial of class certification on other Rule 23 grounds. This would seriously undermine Rule 23's goal of assuaging the due process concerns that arise from the binding effect of class judgments on persons not present in the litigation by assuring that the named class representative can fully and fairly litigate class claims. *See Hansberry* v. *Lee*, 311 U.S. 32 (1940). The courts rely on the adversary system to address potential inadequacies in a class representative; and the distortion of the defendant's incentive to challenge the class representative's adequacy presents serious concerns.

et ux. v. *United States*, 535 U.S. 43, 50 (2002). Neither circumstance obtains here; and while there are other circumstances in which tolling may be appropriate, they are limited. See *id.*; see also *Baldwin County Welcome Ctr.* v. *Brown*, 466 U.S. 147, 151 (1984) (per curiam). To justify the Third Circuit rule extending tolling to this setting, there ought to be urgent considerations related to the administration of Rule 23. But, the Third Circuit points to none – indeed, as noted, considerations of efficieney support litigation of the class-certification issue in a single forum for purposes of determining the period of tolling.

Fourth, the Federal Rules of Civil Procedure are intended to establish uniform treatment of all federal cases on matters that are procedural in nature. A lack of uniformity in the interpretation or application of these rules is fundamentally unfair to litigants in class cases. Neither plaintiffs nor defendants should be confronted with less favorable rules depending upon whether a federal nationwide class action is brought in Atlanta or Philadelphia. The current lack of uniformity simply encourages unseemly forum shopping by plaintiffs eager to leverage class certification into coercive settlements. Indeed, plaintiffs here acknowledged that the "precedential force" of *Griffin* in the Eleventh Circuit was "precisely what [plaintiffs] sought to avoid by not filing this action in the Northern District of Georgia." App. 14a n.6. See *id.* at 30a ("[o]ur circuit will attract actions in which courts in other circuits denied class certification") (Alito, J., dissenting). Indeed, this problem is particularly acute in the class-action setting because plaintiffs generally have limitless options as to where they can bring the lawsuit. To permit materially conflicting standards among the circuits unjustly equips plaintiffs' counsel with a one-way ratchet to a more favorable set of rules on the availability of a class action.

Rule 23 is a critically important procedural rule, and statutes of limitation reflect fundamental interests of stability, notice and repose. A conflict concerning an important aspect

of Rule 23's interpretation and application at its intersection with the law governing all federal limitations periods is particularly worthy of this Court's review.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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